FILE COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 32

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY,

REPLY BRIEF FOR RESPONDENT

ALEX W. DAVIS,
ROBERT B. MURPHEY,
514 Pacific Mutual Building, Los Angeles 14,
Attorneys for California Portland Cement Company.

MURPHEY AND DAVIS,
Of Counsel.

SUBJECT INDEX

	PAGE
Opinion below	1
Statement of jurisdiction	1
Statement of the case	2
1. Reference to other briefs	2
2. The unique character of the case against California Portland	3
3. Facts about California Portland	4
4. Market area	4
5. Competitors	5
6. Pricing system	6
7. The Cement Institute	6
8. Trade associations	7
9. Practices referred to in paragraph 7 of the complaint	7
10. Discrimination in price under the Clayton Act	7
11. Findings as to California Portland	8
Summary of argument	9
1. Effect of membership in the Institute	9
2. The doctrine of the Maltsters case and the Milk Can case	9
3. There is no finding that California Portland participated in a conspiracy and no finding from which a finding of its participation in a conspiracy can be inferred	10
4. There is no substantial evidence to sustain any finding against California Portland on the allegations of the complaint	11
5. As to Count 2	12

PAGE

Argument 13

Count I 13

I. The Commission's contention respecting the inference of conspiracy from membership in the Institute 13

II. The principles of the Maltsters and Milk Can cases are not applicable to the California Portland case 15

III. There is no finding that California Portland participated in the alleged conspiracy or in acts or practices to support or further the same 17

1. The Commission's contention 17

2. Analysis of the findings 18

IV. The findings insofar as they might be held to apply to California Portland are not sustained by the evidence 23

1. The evidence is not sufficient to sustain a finding that California Portland used the pricing "system" described in the complaint and the findings 24

(a) What is the multiple basing point system 24

(b) California Portland does not use the "multiple basing point pricing method" in California commerce 25

(c) California Portland does not use the "multiple basing point pricing method" in interstate commerce 28

(d) California Portland has not considered or believed that its pricing methods are the same as or similar to the pricing method complained of in the complaint 32

(e) The Commission's other points 32

PAGE

2. The findings or the evidence respecting the acts or practices of California Portland in pricing cement for sales to government agencies are not sufficient to give rise to an inference or to sustain a finding or conclusion that California Portland used the pricing system or was a party to a conspiracy..... 35

(a) Practices of California Portland with respect to pricing and f.o.b. mill bidding on government sales 36

(b) Practices with respect to land grant rates..... 38

(c) Exact six decimal land grant rate information was of no importance to California Portland in determining bid prices because its policy was to bid in two or three decimals and not to attempt to tie bidding..... 40

(d) Bartlett Dam special freight rate..... 41

3. The evidence is not sufficient to sustain findings against California Portland on the Institute issues..... 44

(a) A finding that during California Portland's membership, the Institute was organized or existed for the purpose of supporting the multiple basing point system and the elimination of price competition among its members..... 44

(b) A finding that during the period of such membership the Institute carried on activities to support the multiple basing point system and the elimination of price competition among respondents 46

(c) A finding that Pacific Coast Cement Institute or its activities were in any way connected with The Cement Institute or its activities..... 50

PAGE

(d) A finding that California Portland had knowledge or was charged with knowledge that the Institute was organized or existed, or carried on activities, for the purpose of maintaining the multiple basing point system and eliminating price competition among respondents..... 52

4. The evidence is not sufficient to sustain findings that California Portland, collectively with the other respondents, followed trade practices and actions set forth in paragraph 7 of the complaint or in the findings 55

5. The evidence is not sufficient to sustain a finding that California Portland participated in the alleged conspiracy to restrain competition by the collective use of the multiple basing point system..... 56

(a) There is no direct evidence of conspiracy or agreement 56

(b) There is no evidence from which it can be inferred that California Portland participated in the alleged conspiracy..... 57

Count II 58

I. There are no findings on Count II issues against California Portland 58

1. The issue of discrimination in price..... 58

2. The issue of justification in meeting in good faith equally low prices of competitors..... 59

II. The findings against California Portland on Count II issues are not sustained by the evidence..... 60

1. The finding of price discrimination..... 60

2. The findings on the issue of justification in meeting in good faith equally low prices of a competitor..... 62

3. The finding on the issue of the effect of the "price differential" to restrain competition..... 65

PAGE

III. Other points 68

1. The order is erroneous in that the acts prohibited do not constitute unfair methods of competition or a contract, combination or conspiracy in restraint of interstate commerce 68

2. The order is erroneous in that it prohibits methods of competition and acts and practices not charged in the complaint 68

3. The order is erroneous in that it is so vague and indefinite as not to provide a standard of conduct by which respondent can be guided 69

4. The findings are improper in form and indefinite and argumentative and lack the requisites of findings upon which an order may be based 69

5. The Commission erred in admitting evidence which was not admissible against respondent and in overruling respondent's objections and denying petitioner's motion to strike or to limit the application of the evidence 69

Conclusion 70

TABLE OF AUTHORITIES CITED

CASES

	PAGE
Aetna Portland Cement Co. v. Federal Trade Commission, 157 F. (2d) 533	1
Fort Howard Paper Co. v. Federal Trade Commission, 156 F. (2d) 899	9, 15, 16
Milk and Ice Cream Can Institute v. Federal Trade Commission, 152 F. (2d) 479	9, 15, 16, 38, 57
Schechter Poultry Corp. v. United States, 295 U. S. 495	46
United States Maltsters Assn. v. Federal Trade Commission, 152 F. (2d) 161	9, 15, 16, 38, 57

STATUTES

Clayton Act, Sec. 11	1
Federal Trade Commission Act, Sec. 15c	1

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 32

FEDERAL TRADE COMMISSION,

Petitioner,

vs.

CALIFORNIA PORTLAND CEMENT COMPANY.

REPLY BRIEF FOR RESPONDENT

OPINION BELOW.

The Opinion of the Circuit Court of Appeals [R. 16761] is reported in 157 F. (2d) 533.

The case below was consolidated for argument with the cases involved here as Nos. 23 to 31 and 33 and 34 and the Opinion below covers all cases.

STATEMENT OF JURISDICTION.

The Petition below was for a review of an Order of the Federal Trade Commission under the provisions of Section 5(c) of the Federal Trade Commission Act and Section 11 of the Clayton Act. The case is here on writ of certiorari issued under authority of said Acts.

STATEMENT OF THE CASE.

1. Reference to Other Briefs.

This brief is filed on behalf of the single respondent in Case 32. The respondent, whom we shall call "California Portland," appeared separately throughout the proceedings before the Commission, presented its separate petition to the Circuit Court of Appeals and appears separately here.

We have asked for and received a copy of the preliminary draft of the brief to be filed in Cases 23, 24 and 34. That brief covers the points of law involved in this case and covers the points therein discussed and particularly the sufficiency of the findings and the evidence in so far as they affect the respondents generally. We refer to that brief for such points and adopt the argument of such brief except as to any point which may be inconsistent with points made in this brief.

We refer to the brief to be filed by Riverside Cement Company in Case No. 30 and adopt the arguments therein which are applicable equally to the two respondents.

We shall attempt to avoid duplication of argument made in other briefs. We regret the necessity of filing so long a brief but the Commission, by mere reference in most cases, has made points which require analysis and reply.

2. The Unique Character of the Case Against California Portland.

California Portland has contended throughout the proceedings and contends here that the case against it is unique, that it does business in an isolated market area insulated by sparsely inhabited spaces from competition with companies in other market areas, that there has been no motive or purpose to conspire with companies in other market areas either to lessen competition or to maintain uniformity in prices or trade practices.

We agree quite thoroughly with the contentions made by the respondents in the other cases and in the opinion of the court below that there are no findings sufficient to sustain the Commission's Order against any respondent and that the evidence is not sufficient to sustain a finding that any respondent conspired as charged in the Complaint. We join in the argument made in the brief in Cases 23, 24 and 34 to that effect.

We also agree with the general effect of the remark of Justice Evans in his dissenting opinion that if it is determined that the findings or the evidence are sufficient to sustain the Commission's Order against a substantial number of the respondents and the Order can stand as against such respondents, *"if the evidence fails to show that one or more of the defendants is a party to the conspiracy,"* said defendants should be dismissed from the proceeding.

Therefore, for the purpose of our argument in this

and devote this brief to the points (1) that the findings are not sufficient to sustain the Order as against California Portland and (2) that the evidence is not sufficient to sustain any findings as against California Portland which could support an order against it.

3. Facts About California Portland

California Portland is a California corporation having its principal place of business at Los Angeles, California, and its manufacturing plant at Colton, California, approximately 56 miles east of Los Angeles. [R. 15964.] The company was organized in 1891. Its stock is closely and independently held, the great bulk of stock being held by five shareholders. Substantially all of the stock is locally held in Southern California. No officer or director is an officer or director of any other cement producer. The company's mill and its sources of limestone have been at the same location since 1892. [R. 13030.]

4. Market Area.

California Portland's normal market area is southern California, central and western Arizona and southern Nevada. Approximately 96% of its production was marketed in southern California, approximately 4% was marketed in Arizona and negligible quantities were marketed in Nevada. [R. 13035.] This is exclusive of the abnormal sales to the Federal Government for Boulder Dam in 1933-35 which were at prices substantially below the commercial prices and had no relation to the mill net from commercial business. [R. 13043, 13057, Comm. Exs. 132, 134.] Such market area is isolated from

neighboring areas by vast spaces of sparsely settled desert and mountain areas. It is insulated from competition with mills located out of California by uninhabited areas and great distances. No out of state mill can compete in California because the freight rates from the nearest out of state mill are prohibitive. [R. 13037.] The El Paso mill of Southwestern is the only out of state mill which can compete in the interstate market area and such competition is limited to central Arizona.

Obviously no motive or purpose to combine with any out of state mill respecting pricing methods can exist.

5. Competitors.

California Portland, Riverside and Monolith have mills only in Southern California. Southwestern has a mill in southern California, a mill at El Paso, Texas, and a mill in Ohio. [R. 15974, 15971, 15975.] The California Portland mill and the Riverside mill are located within about 4 miles of each other and equally distant from the markets in southern California, Arizona and Nevada and with equal commercial freight rates to practically all destinations. The Victorville mill of Southwestern and the Monolith mill are located east of the mountains in the sparsely settled desert areas and have equal freight rates to the populous southern California market points 2¢ per cwt. (and at times 1¢) greater than the freight rates from the Colton and Riverside mills. [R. 13058.] All four mills have equal freight rates to the destination points in central and western Arizona which constitute the principal interstate market for cement. The El Paso mill has the same freight rate to the central Arizona points which constitute the principal market.

6. Pricing System.

California Portland has priced its cement by methods radically different from the pricing *"system"* described in the Complaint and in the findings.

In southern California it maintains blanket prices for trade areas, zone prices, and disregards the differences in freight rates from its mill, and from the mill or shipping point of any competitor, to the various destination points within a trade area or zone.

In Arizona the pricing method is based on the peculiar freight rate condition and the requirements of the Robinson-Patman Act. The principal market area, being central Arizona, including practically all of the large towns, has the equal blanket freight rate from all mills. Western Arizona points (other than Yuma) although closer to the southern California mills, have this same blanket freight rate from the southern California mills. Destinations in the blanket area naturally have the same destination prices. Such prices were not fixed with any exact relation to the mill net from California business. The prices at other Arizona destinations were fixed with Clayton Act relation to the price in the blanket area. [R. 13040, 13057.]

7. The Cement Institute.

California Portland joined the Institute in June, 1933, in order to participate in the formulation and administration of the N. R. A. Code. After the Code period it continued its membership because it thought there were legitimate trade association activities which the Institute could perform. It did not know or believe that the Institute existed to maintain the "multiple basing point" system or to restrain competition in any way. [R. 13031.]

During most of the first two years of its membership, the N. R. A. Code was in effect. We are concerned here primarily with the two year period from the date of the Schechter decision in May, 1935 to the date of the filing of the Complaint in this proceeding on July 2, 1937.

8. Trade Associations.

California Portland was not a member of any of the following trade associations: Association of American Portland Cement Manufacturers, Association of Licensed Cement Manufacturers, Cement Manufacturers' Protective Association [R. 13058], Portland Cement Association. [Comm. Ex. 3007.]

9. Practices Referred to in Paragraph 7 of the Complaint.

California Portland did not receive or use the freight rate books referred to in the Complaint and the findings. [R. 13044.] California Portland produced affirmative evidence that it did not participate in practices charged in paragraph 7 of the Complaint [R. 13034-13063], and there is no evidence or finding to the contrary.

10. Discrimination in Price Under the Clayton Act.

In its interstate commerce, California Portland quoted prices involving differentials in amounts greater or less than the differences in freight cost only for a very few destinations in sparsely settled eastern Arizona. The volume of sales involved aggregated an infinitesimal per cent of its total sales. The differences involved freight absorption and not phantom freight. The affirmative evidence showed that the differences in price at such destina-

tions were made in good faith to meet equally low prices of a competitor. [R. 13059-63.] There was no evidence to the contrary.

11. Findings as to California Portland Cement Company.

The name of California Portland is found only two times in the more than 200 subparagraphs of the findings. In paragraph 1(e) it is found that it is a California corporation and joined the Institute in 1933. [R. 15964.] In paragraph 8(o) the name of the company is found in a tabulation of freight rates to a destination outside the company's market area. [R. 16022.] The geographical area in which the company markets cement is referred to in paragraph 7(m) where it is found that the method of pricing in Southern California is different from the *"system"* described in the Complaint and findings. [R. 16000.] In paragraph 8(l) the "Southern California mills" are mentioned in a telegram to the Code Authority regarding a Government bid for a destination far outside the market area. [R. 16016.] In paragraph 8(o), there is reference to publication of price lists "by certain respondents on the Pacific Coast," to "informal interchanges of land-grant rates among certain of these respondents" and to Pacific Coast Cement Institute. [R. 16021.] Nowhere else in the findings is the company or its market area mentioned. Nowhere else in the findings is California Portland identified as being one of the companies included in the general reference to "some of the respondents" or "respondents" as those terms are used in the findings and defined in paragraph 6 of the findings. See the quotation on this point at page 91 of the Commission's brief.

SUMMARY OF ARGUMENT.

1. Effect of Membership in the Institute.

The Commission's argument that participation in the alleged conspiracy must be inferred from membership in the Institute is not applicable to California Portland because the additional conditions which are necessary parts of the Commission's theory did not exist as to California Portland. There is no evidence or finding (a) that California Portland used a pricing method the same as or similar to the pricing "system" described in the Complaint and findings, (b) that California Portland had "knowledge express or necessarily implied" of any purpose or acts of the Institute to support or maintain the price "system" described in the Complaint and the "elimination of price competition among respondents," or (c) that the Institute had any function to, or did, support or maintain the said pricing "system" or the elimination of price competition among respondents. The evidence affirmatively shows that California Portland did not use a pricing method similar to the "system" described in the Complaint and findings, and that California Portland did not have knowledge of any purpose or acts of the Institute to support or maintain the alleged "system" and the elimination of price competition.

2. The Doctrine of the Maltsters Case and the Milk Can Case.

The doctrine of the *Maltsters* case, the *Milk Can* case and the *Ft. Howard* case that an inference of conspiracy may be drawn from the common use of a pricing "system" is not applicable to California Portland because the elements present in those cases on which the inferences

were based are not present in the evidence or findings against California Portland. It appeared affirmatively (a) that California Portland did not compete with the great bulk of the respondents involved in the alleged conspiracy or in any market area except its isolated corner of the country, (b) that California Portland did not use the pricing "system" charged against respondents in other market areas and did not use a "system" involving any artificial or unnatural formula, (c) that the competing mills in California Portland's market area are relatively close together and the prices at destinations in the market area have not been at artificial or unnatural levels.

3. There Is No Finding That California Portland Participated in a Conspiracy and No Finding From Which a Finding of Its Participation in a Conspiracy Must Be Inferred.

The Commission in Section I(D) of its brief (page 62) relies on the "conclusion" paragraph [R. 16132], paragraph 26 [R. 16131] and paragraph 24 [R. 16128] of the findings as findings of conspiracy. In each of such paragraphs a "finding" of conspiracy is not a general finding but is qualified. Thus the conclusion is of a "combination of respondents *as hereinabove found.*" Paragraph 26 concludes that there is a "combination maintained by respondents herein *in the manner aforesaid.*" Paragraph 24 applies only to count 2 and finds primarily that *the multiple basing point system* "constitutes a combination of respondents to discriminate in price." It is obvious that this general finding regarding

paragraphs of the Complaint incorporated in count 2 by reference is a mere incorporation by reference of the specific findings of count 1.

There is no finding that California Portland used the "pricing system" or engaged in any of the specific practices or acts alleged in paragraphs 5 and 7 of the Complaint. There is no finding that California Portland had any knowledge that it was a purpose of the Institute to support or maintain the pricing "system" described in the Complaint and the findings, or that the Institute was doing acts to support or maintain the elimination of price competition among any of its members.

4. There Is No Substantial Evidence to Sustain Any Finding Against California Portland on the Allegations of the Complaint.

There is no evidence that California Portland used the pricing "system" described in the Complaint and findings. There is no evidence that it had any knowledge of any improper purpose of the Institute or of improper acts of the Institute. There is no evidence that it followed the practices or did any of the acts alleged in paragraph 7 of the Complaint.

The affirmative evidence shows that California Portland did not use the said pricing "system" or a pricing method similar thereto, that California Portland did not have knowledge of any improper purpose of the Institute and that it did not follow the practices or do the acts alleged in paragraph 7.

5. As to Count 2.

In its interstate commerce, California Portland sold cement at prices which differed in amounts greater or less than the differences in costs of delivery (absorbed freight) only at a very few destinations in sparsely settled eastern Arizona. Sales at such destinations involved an infinitesimal percentage of its sales. It made no sales at prices which involved phantom freight. With respect to the prices at the few destinations in eastern Arizona where there was "freight absorbtion" in the price, there was no evidence whatever that there was any effect to restrain competition. The evidence affirmatively showed (a) that the differences in price did not have any effect to lessen or restrain competition and (b) that the differences in price were made in good faith to meet equally low prices of a competitor.

ARGUMENT ON COUNT I.

I. THE COMMISSION'S CONTENTION RESPECTING THE INFERENCE OF CONSPIRACY FROM MEMBERSHIP IN THE INSTITUTE.

The Commission, commencing at pages 92 and 93 of its brief, attempts to bypass the issue that the findings do not specify the participation of California Portland in the alleged conspiracy or in the acts and practices by which it claims the conspiracy was made effective, and the issue that the evidence would not sustain a finding that California Portland participated in the alleged conspiracy or in acts and practices to make it effective. It submits that the questions can be disposed of without a detailed review of the findings or the evidence applicable to California Portland. It argues that it can rest its case against California Portland wholly on the proposition that membership of California Portland in the Institute by itself is sufficient to tie California Portland into the combination and the actions taken to support the combination. The argument is based on an assumption that the following facts are properly found:

(a) That the Institute was organized and existed to support and maintain the pricing *"system"* described in the Complaint and findings;

(b) That the Institute in an exercise of its functions did support and maintain the said system and the "elimination of price competition among respondents";

(c) That California Portland used a pricing method not significantly different from the pricing *"system"* described in the Complaint and findings; and

(d) That California Portland had "knowledge, express or necessarily implied, of the said purposes and acts of the Institute.". (Page 95.)

The factual answers to the contention are that none of the four facts is found in the findings and that there is no evidence which would sustain a finding on any one of the four facts. An analysis of the Commission's argument shows that it is a mere attempt at over-simplification of the basic issue of the propriety of an inference of conspiracy from the facts properly found. The argument cannot be applied until we have disposed of the points that there are no findings of the facts on which the argument depends and that the evidence is not sufficient to sustain findings of such facts.

The Commission concedes, and it is obvious, that an inference that California Portland participated in the alleged conspiracy is not justified unless each and all of the four facts are found and proved. The absence of the single fact that California Portland used the pricing "system" is sufficient to destroy the argument. This point is considered in a separate part of the brief. The absence of any one of the other points also destroys the argument. The existence of findings on the said points and the sufficiency of the evidence to sustain such findings are considered in the portion of this brief devoted to consideration of the sufficiency of the evidence.

We treat the Commission's argument separately here because the Commission argues that the point can be decided without a detailed review of the findings or the evidence applicable to California Portland.

II. THE PRINCIPLES OF THE MALTSTERS AND MILK CAN CASES ARE NOT APPLICABLE TO THE CALIFORNIA PORTLAND CASE.

The Commission argues at page 55 of its brief that the conspiracy charged in the Complaint is to be inferred from the things actually done by each respondent. It contends that participation in the conspiracy is to be inferred from the use of the price "system" described in the Complaint and the findings in an application of the principles applied in the *Maltsters* case, 152 F. (2d) 161, the *Milk Can* case, 152 F. (2d) 479, and the *Ft. Howard* case, 156 F. (2d) 899. (Comm. Br. p. 55.) In each of the said cases the following three conditions existed:

(1) Each and all respondents competed with each other respondent in a common trade area;

(2) Each and all respondents used the same artificial and unnatural pricing "system" involving the use of an artificial and arbitrary formula to produce equal prices for all respondents at each destination in the common trade area;

(3) The factories of respondents, although in direct competition with each other throughout a common trade area, were located at widely separated shipping points with large differences in freight rates from shipping points to destinations, and the equal destination prices resulting from the use of the price "system" were at unnatural and artificial levels.

An inference of conspiracy quite naturally sprang from such sets of facts.

None of the three conditions exists in this case as against California Portland:

(1) California competes substantially with only three other respondents all operating only in a single isolated market area in the southwest corner of the United States. No out of state mill competes in California business and only one out of state mill competes in interstate business and the competition of the out of state mill exists as to less than 4% of California Portland's production. [R. 13035-37-38.]

(2) California Portland has not used the pricing "system" described in the Complaint and the findings or any system used in any other market area or any system involving the use of an artificial or unnatural formula. [R. 13038-40.] This point is fully discussed in a separate section of this brief (page 24).

(3) The competing mills are relatively close together and the prices at destinations in the market area have not been at artificial or unnatural levels. It does not appear that there is any phantom freight involved in prices at any points in the market area. [R. 13038-41.] The Commission has not made any contention to the contrary with respect to the commercial prices in the market area so we will not enlarge on the discussion. In fact the Commission agreed that the level of prices and the relationship between costs and prices were not in issue, had no relation to method of price making. [R. 8589.]

The Commission did contend (pages 56-59) that the principle of the *Maltsters* and *Milk Can* cases is particularly applicable to the practices of respondents in bidding on Government invitations, especially in sales involving land grant freight rates. The general point is

argued in other briefs and we limit ourselves to the point that California Portland's methods of pricing on Government bids were not the same as or similar to the methods which the Commission charges were used in other market areas. No unnatural pricing formula was used and no unnatural or artificial prices resulted in California Portland's bidding. The point is presented at a later point in this brief (page 35).

III. THERE IS NO FINDING THAT CALIFORNIA PORTLAND PARTICIPATED IN THE ALLEGED CONSPIRACY OR IN ACTS OR PRACTICES TO SUPPORT OR FURTHER THE SAME.

(1) The Commission's Contention.

The Commission concedes (page 61) that the *basic findings* are those which find on the subject of the *respondent producers'* use of the pricing "system" and employment of many types of collective action for the maintenance of the "system." It contends that the conclusion paragraph [R. 16132] and paragraph 26 [R. 16131] "constitute adequate findings of combination and implied agreement." We pointed out in the summary that these general conclusions of combination are qualified and refer only to the "*effect* of the combination maintained by respondents *in the manner aforesaid.*" There is no general finding of combination against all respondents.

The Commission in looking for a finding of conspiracy concedes that such a finding, particularly of the subject matter of the conspiracy, can be established only by inferences necessarily drawn from findings of specific actions of "respondents," that is, the "basic findings" above

referred to. (Page 61.) In considering the question of the application of such findings of specific acts to a particular respondent, the Commission argues that such findings are material only as findings of acts done to further or support the conspiracy. (Page 91.) It argues that it does not have the burden of "setting forth the character and extent of the participation of each respondent in such overall combination" and concedes "the generality of some of them (the findings) with reference to the particular respondents involved."

It is fundamental of course that in looking for a finding of conspiracy against California Portland or for an inference of conspiracy from acts proved, we can look only to findings which definitely and specifically apply to California Portland and to acts definitely and specifically found and proved against California Portland. The doctrine of imputation has no application until the participation in the conspiracy is definitely found and proved.

(2) Analysis of the Findings.

Our inquiry here is, what paragraphs of the findings do identify California Portland and support an inference that it participated in the conspiracy.

The findings are studiously verbose and indirect and with great care avoid direct and definite language. The obvious purpose is to be ambiguous so as to permit innuendo broader than could be justified with direct and definite findings which the Commission would dare to make. By resorting to verbosity and indirection, the general word "respondents" with the studious omission of the word "the" might be interpreted as meaning "all respondents" when as a matter of fact only an interpretation of "some respondents" is justified and intended.

Obviously of course the word "respondents" as used in the findings and in the brief cannot mean "all respondents." The individual respondents, that is, the officers and directors of the Institute, quite obviously were involved in only a few of the many acts or agreements attributed to "respondents" generally. It is equally obvious that the Institute which did not market or price cement is not included in more than a few of the references to "respondents," and that companies recently organized cannot be included as to acts attributed to "respondents" when the acts were done before the companies were in business. An obvious illustration is paragraph 12(b) [R. 16056] which refers to the Institute's code of ethics "adopted by respondents." The code was adopted in 1930 and cancelled in 1933. Only a few respondents participated in the adoption.

Paragraph 6 [R. 15923] finds acts done by "cement producers" without specifying names or stating that they are respondents.

In paragraph 7(a) the finding is that "respondents" (carefully omitting the word "the") use *a* multiple basing point system and that the "*formula* used to make the system operative is" (describing it). There is no finding that the *formula* is used by "respondents." It should be noted that in the first sentences of paragraphs 7(a) and 7(b), where all respondents are obviously referred to, the word "the" is used before the word "respondents," [R. 16000.]

Paragraph 7(h) finds that the multiple basing point formula was not evolved and put into operation at one stroke but its territorial application was extended from time to time as a result of understandings and agreements among "*cement manufacturers.*" [R. 15991.] In

paragraph 7(i) reference is made to actions of associations of cement manufacturers. California Portland was not a member of any of the associations until it joined the Institute in June 1933. [R. 13058, Comm. Ex. 3007.] Then in paragraph 7(m) [R. 16000] it is found that the record does not show the date or manner of the extension of the multiple basing point delivered price system to California. This expressly finds that there is no evidence of conspiracy against California Portland in connection with its adoption of the "system" if it ever adopted it.

In paragraph 7(m), referring specifically to California Portland's market area, it is found that the multiple basing point system was in existence in California during the first World War; that in Southern California the system is modified by a system of zone prices applicable in certain areas and that destination prices are shown by price lists, and separate formula calculations are not used for each transaction. [R. 16000.]

In paragraph 9(a) [R. 16023] it is found that "respondents" pricing formula *"when supplemented by common freight factors"* produces identical prices; that in particular locations at particular periods there have been zone and area prices.

In paragraph 8(a) [R. 16006] it is found that in order that the *"pricing formula"* produce identical prices, it is necessary that an identical freight factor be used.

In paragraph 8(c) [R. 16008] it is found that freight books were published "for substantially every state east of the Rocky Mountains" and in paragraph 8(g) [R. 16012] it is found that the freight books were used by most corporate respondents in territories covered by the

books to provide the identical freight factor for the alleged pricing formula. This finding expressly excludes California Portland's market area.

Paragraphs 12(a) and (c) [R. 16055-57] refer to "respondents' price system" and "respondents' pricing formula" but make no findings of acts by "respondents" generally.

Paragraph 12(b) as noted above refers to the Institute code of ethics "adopted by *respondents* when the Institute was organized." Since California Portland and most of the respondents did not participate in the adoption, this illustrates the point that the word "respondents" is not intended to include all respondents.

Paragraphs 13(d) and (e) [R. 16061] refer to specific job contract checking by the Institute for "its members." The Commission will concede that this service was never extended to the Pacific Coast and that the findi g is not intended to refer to all members.

Paragraph 14 [R. 16065] finds that "respondents'" basing point system has been supplemented by uniformity of terms and conditions of sale "brought about by collective action." The collective action is specified and no action by California Portland or respondents in its market area is included except that California Portland was a member of the Institute when the "compendium" referred to in subparagraph (g) was issued.

Paragraph 17(a) [R. 16090] finds that "means were sought by respondents" to eliminate or avoid price cutting by dealers. The acts referred to are then found and include no participation by California Portland.

Paragraph 18(a) [R. 16099] finds that "concerted action of respondents" in dividing business between pro-

ducers and dealers included a division of the sales to Government agencies. Specific acts are then set forth and include no action by California Portland or in its market area.

Paragraph 20(e) [R. 16106] finds that "respondents" have given publicity to the claim that the quality of cements is practically identical. Specific acts are found but none is found respecting California Portland (except that California Portland was a member of the Institute).

Paragraph 21(a) [R. 16108] finds a course of action "by the Institute and its members." Specific acts are listed but no action by California Portland or by companies in its market area is referred to.

Paragraph 23(a) [R. 16124] bearing on Count II finds that the multiple basing point system "used by the corporate respondents" is a discriminatory method. The finding is explained by specific illustrations which are quite different from any situation which exists in California Portland's market area or which could exist under the pricing method referred to in paragraph 7(m) of the findings.

The above are the only findings which we can identify as finding acts by "respondents" generally. The other findings refer to some of the respondents, or respondents in certain areas, etc., or find that acts were taken without specifying by whom, and contain nothing which identifies California Portland as included in the findings.

We submit that there is no finding that California Portland participated in the alleged conspiracy and no finding of facts against California Portland from which a finding of participation, or the fact of participation, in the alleged conspiracy can be inferred.

IV. THE FINDINGS IN SO FAR AS THEY MIGHT BE HELD TO APPLY TO CALIFORNIA PORTLAND ARE NOT SUSTAINED BY THE EVIDENCE.

The Commission by Section I(F) of its brief (page 93) suggests that there are only a few of the findings which we are called on to consider. The argument suggests that we may limit our consideration of the sufficiency of the evidence to the following findings:

(1) A finding that California Portland used the pricing "system" described in the Complaint and findings;

(2) A finding that California Portland followed practices charged by the Commission with respect to bids on Government invitations.

(a) Practices with respect to pricing and f.o.b. mill bidding;

(b) Practices with respect to land grant and special rates.

(3) Findings (a) that, during California Portland's membership, the Institute was organized or existed for the purpose of supporting the multiple basing point system and the elimination of price competition among its members, (b) that during the period of such membership, the Institute did acts to support the said system and the elimination of price competition among respondents, and (c) that California Portland had knowledge, or was charged with notice, that the Institute was organized or existed for such purpose and did such acts in support or furtherance of such purpose.

(4) Findings respecting acts and practices referred to in paragraph 7 of the Complaint in so far as they bear

on acts of the Institute in support of the pricing system and the elimination of price competition or the knowledge of California Portland.

It appears that the Commission's suggestion has little effect to narrow the scope of the consideration, except of course, that "it indicates that no point is made that California Portland is directly connected with acts other than the alleged use of the pricing system and membership in the Institute.

1. The Evidence Is Not Sufficient to Sustain a Finding That California Portland Used the Pricing "System" Described in the Complaint and Findings.

(a) What Is the "Multiple Basing Point System"?

We look to the Complaint where the combination or conspiracy to employ the system is charged. The system is described in detail in paragraph 5 of the Complaint. [R. 54.]

5(c). "Under said pricing system each producing respondent . . . quotes and charges . . . a delivered price derived by the use of a formula. Such formula is: The prevailing price at the governing basing point plus the all-rail rate of freight from said governing basing point to the location of the customer."

5(b). The delivered price is determined by the use of two factors. For any destination in the United States there is a *governing basing point.* There are in the cement industry approximately 60 basing points, each with its *base price.* This is the first factor. The second factor is the freight rate from the *governing basing point* to the destination.

In looking at the hypothetical question put to Dr. Jacob Viner [R. 5199] and Dr. Frank Fetter [R. 5588] we find the same description of the "multiple basing point system."

We find a description in the Findings in paragraph 7(a) [R. 15988] with an illustration of its operation in paragraph 7(g). [R. 15991.]

The importance of the freight factor is alleged and explained in paragraph 7(a) of the Complaint. [R. 91.] It is alleged that the conspiracy contemplates that all producer parties to it shall use the same freight rates in applying the freight rate factor to determine price at a given destination and that this purpose is accomplished by the distribution and use of the Institute's freight rate books. The Findings on this point are in paragraph 8. [R. 16006.] Paragraph 8(a) is very definite on the point that in order for the price formula to produce identical prices at any given delivery point it is necessary that the freight factor set by each seller shall be the same.

(b) California Portland Does Not Use the "Multiple Basing Point" Pricing Method in California Commerce.

The Commission concedes in paragraph 7(m) of the Findings. [R. 16000], that in Southern California the multiple basing point system is "modified by an elaborate system of zone pricing applicable in *certain areas.*" It concedes that within the said *"certain areas"* there is no use of the "multiple basing point" formula. It also concedes that there is no use of the formula because each mill has a price list which shows its delivered price at substantially all delivery points.

The "zone" system which California Portland uses is described in the testimony of James A. Blair at Record page 13038, and we quote from it:

"The Company does not maintain a pricing system for the sale of cement in California under which prices are fixed on a basis of a mill price plus freight to the destination. For more than ten years the Company has maintained blanket prices for trade areas in Southern California and has disregarded the differences in the freight rates from its mill, and the mill or shipping point of any competitor, to the various destination points within a trade area.

". . . To illustrate my testimony and for purpose of example I have selected several points having equal destination prices in the noted trade areas and set forth the freight rates from the several mills and shipping points to such points as such rates are shown on the records of our traffic department. The freight rates are those recorded for 1937 prior to November 15.

Destination	Gross Price in Cloth	Freight Per Cwt.	Freight Per Bbl.	Mill Net Colton
Los Angeles	2.32	0.04	0.152	1.568
Long Beach	2.32	0.045	0.171	1.549
Redondo Beach	2.32	0.050	0.190	1.530
San Diego	2.52	0.095	0.361	1.559
La Mesa	2.52	0.110	0.418	1.502
Chula Vista	2.52	0.125	0.475	1.445
Ventura	2.48	0.090	0.342	1.538
Oxnard	2.48	0.085	0.323	1.557
Santa Paula	2.48	0.075	0.285	1.595

Price List: October 12, 1936.

Freight rates from Colton to all points are at low as or lower than from any other mill."

The commission concedes apparently that the "zone" system, so far as it extends, is not a "multiple basing point system." It seeks to infer that there are other areas in which the "multiple basing point" system does apply. The evidence does not sustain such inference. [Comm. Ex. 1310, R. 13066-67.]

The Commission apparently has located the price areas on a map of Southern California and has concluded that there are areas on the map which are not included in any zone. An application of a knowledge of the geography of Southern California, within the judicial notice of the court, will show that the trade areas include all of the inhabited areas, the coastal plains and the fingers extending up the cultivated valleys and the mining districts. Mr. Blair described this geography briefly at page 13062 of the Record.

Obviously, the California price system is not the system charged in the Complaint. It is entirely different from the system in use in all other parts of the country. Each destination produces a different mill net. The price is not based on a base price plus freight. The price is fixed to fit competitive conditions among purchasers in overlapping trade areas. Even the principal market centers in the various areas do not produce the same mill nets. Thus, in the illustration given in Mr. Blair's testimony noted above the mill nets from the principal centers in the trade areas referred to are: Los Angeles, $1.568; San Diego, $1.559; Ventura, $1.538.

The evidence regarding this intrastate commerce is not material except as it has a bearing in proof that California Portland was or was not a party to a conspiracy to employ the "multiple basing point system." The fact that that system is not used in California disposes of Findings 7(a) and 7(h) so far as California Portland's intrastate commerce is concerned.

(c) California Portland Does Not Use the "Multiple Basing Point" Pricing Method in Interstate Commerce.

The volume of California Portland's interstate commerce is shown by the testimony of Mr. Blair at Record page 13036. Percentage wise, it is extremely small, about four per cent.

To understand the pricing method in Arizona, the freight rate schedules and the geography and population of the state must be understood. The court takes judicial notice of the latter.

The Salt River Valley around Phoenix is the only thickly settled section and contains more than one-third of the population of the state. The central counties of the state having a greater part of the population of the state have freight rates which are equal from all competing mills, including the El Paso mill, to all destinations for which prices are quoted. The four Southern California mills including Southwestern's mill at Victorville, have the equal freight rates the same as the Phoenix rate from the mills to western parts of the state. [Comm. Ex. 1317-C, R. 13040.]

By the operation of the ordinary forces of competition, prices of all competing companies for points where freight rates from all mills are equal tend to be equal. The

same is true as to prices for points in western Arizona where the freight rates from all Southern California mills, including Southwestern's mill, are the same.

Obviously, where the great bulk of the territory has a common blanket freight rate from mills of all competitors, and the bulk of the market and the headquarters of the state are in that territory, the conditions in that territory will dominate the fixing of the price for that territory.

Easterly of the blanket freight rate territory there are destinations for which El Paso has a freight rate advantage, that is, for which its competitors have higher freight rates. Southwestern did not publish a price list for the territory. [R. 11854, 11856.] A competitor quoting prices for any of the destinations would assume that the provisions of the Clayton Act would cause Southwestern to quote prices for said destinations making no differences from the blanket area price other than such as make only "due allowance" for differences in cost of delivery.

These were the assumptions which were made by California Portland in fixing its prices for eastern Arizona destination points. [R. 13041.] To the extent that California Portland seeks any business in that area it must meet its competitor's prices.

In the eastern part of Arizona, where El Paso has the freight advantage, California Portland has been represented by dealers only at Bisbee-Lowell, Holbrook and Nogales, and has maintained no salesmen to cover the territory. The ordinary buyer's market for cement in such territory is very small, and California Portland's sales in the territory have been very small. [R. 13041.]

Thus the price in the blanket area is fixed on the basis of competitive conditions existing in that area. The price is not based on a mill net return obtained from California business plus freight to Phoenix. The evidence shows that during the period from December, 1933, to November, 1938, the mill net return from Los Angeles commercial business varied from $1.715 to $1.329 per barrel, whereas the mill net return for the Phoenix business varied from $1.721 to $1.298 per barrel. The table in the testimony of Mr. Blair at Record page 13057 shows the differences in more detail.

The prices in the western part of the state where all Southern California mills have the same freight rate which prevails for Phoenix are the same as the Phoenix prices and necessarily so in applying the Government's interpretation of the Clayton Act. [Comm. Exs. 1317-C, 3060, 3061, 1305-8, 1310-12.]

As shown by Mr. Blair's table at Record page 13036, California Portland's Nevada business has been extremely small except for the Boulder Dam business from 1932 to 1934. In these depression years the Boulder Dam cement sales made a substantial part of California Portland's business. This cement, however, was delivered to the Government at the mill and was priced at the mill. The prices were not based on any price list or mill net therefrom. [R. 13043.] This fact appears from a comparison of the bids which are in evidence as Commission's Exhibits 132 and 134 with California Portland's mill nets on commercial business shown in the testimony of Mr. Blair at Record page 13057. Thus during these periods the mill net on Phoenix business was $1.721 for sacked cement or $1.671 for cement in bulk, whereas Boulder bids

were as follows: January 5, 1932, $1.28; September 26, 1932, $1.24 [Comm. Ex. 132-B]; April 24, 1933, for special low heat cement, $1.55 [Comm. Ex. 132-A]; April 6, 1934, for special low heat cement, $1.49, for standard cement, $1.43. [Comm. Ex. 134-C.]

California Portland prepared price lists stating prices for the destinations in southwestern Nevada. The price lists were not distributed to the trade. Petitioner had one dealer in the State of Nevada at Las Vegas from February, 1929, to May, 1936, but at other times and at other places has had no dealer account in the state. [R. 13043.] Sales within the state, except for the Boulder Dam project were in small fractions of one per cent of California Portland's entire sales. [R. 13036.]

California Portland had not sold any cement in the ten years preceding the date of the trial of this proceeding at any point in Nevada between the California state line and Las Vegas or north of the state line at Scranton on the Tonopah and Tidewater line. [R. 13061.]

The price at Las Vegas on the October 12, 1936 price list [Comm. Ex. 1310] was $3.32 per barrel in cloth sacks, the same price quoted for Phoenix, Arizona. The freight rate to Phoenix was $.315 per cwt., or $1.197 per barrel. [R. 13040.] The freight rate to Las Vegas was $.23 per cwt. or $.874 per barrel. [Comm. Ex. 1310.] The prices in the two widely separated centers of the two market areas were the same on a delivered basis and had no relation to a mill net plus freight.

Destination prices for all points in California Portland's interstate market area were listed on price lists used in the sales office and by salesmen. No formula was used.

(d) California Portland Has Not Considered or Believed That Its Pricing Methods Are the Same as or Similar to the Pricing Method Complained of in the Complaint.

Mr. Duque, the general manager of California Portland, testified [R. 13032] that his company had not known, considered or believed that the pricing methods used by it for either California or Arizona and Nevada are the same as or similar to the pricing methods or systems used in the eastern part of the country or the "system" described in the Complaint as the "multiple basing point system." The testimony of Mr. Blair was to the same effect. [R. 13038.]

(e) The Commission's Points.

The Commission advances the points that a finding that California Portland used the pricing "system" is supported by the following evidence:

(i) Correspondence regarding, and answers to, the Clark and Burns questionnaire by California Portland characterized the mill as a "basing point" (page 99);

(ii) The destination prices of the Southern California companies were equal (page 99);

(iii) There have been no substantial changes in base prices or mill nets (page 46);

(iv) The pricing system results in cross hauling (page 23);

(v) The system tends to force base prices to a high level in order to permit individual companies to sell outside their normal trade areas (page 23).

(i) The Commission refers to the answer of California Portland to the Clark and Burns questionnaire and claims that it constitutes an admission that the California Portland mill was a "basing point" (page 99). This the Commission contends is an admission that California Portland used a multiple basing point system of pricing. The term "basing point" was not defined. There is nothing in the exhibit to indicate that the company used the term "basing point" with the meaning or the significance attached to it by the complaint or the findings. As applied to California Portland's pricing methods, the term cannot have the same meaning as the term "governing basing point" used in Paragraph V of the Complaint or as the term "base mill" used in Paragraph VII(b) of the findings.

The Commission's points which have to do with practices in Government bidding are discussed under the headings on pages 36 and 41 of this brief.

Whether the pricing methods used in Southern California and the portions of Arizona and Nevada are the same as or similar to the "system" described in the Complaint and findings must be concluded from the evidence describing the methods. Answers to questions and questionnaires using undefined terms cannot change the fundamental characters of the methods. More to the point, the answers in question did not characterize the pricing method as a basing point system or as similar to the "system" described in the Complaint.

Of course the differences in zone prices between zones are related to the differences in the freight rates to the principal destinations in the zones. Thus the Ventura price is 16 cents higher than the Los Angeles price where the freight rate is 19 cents higher, the Santa Paula price (in the Ventura zone) is 16 cents higher than the Los Angeles price whereas the freight rate is .133 higher. They do not fit any "system."

(ii) The fact that the four manufacturers in Southern California sell at equal prices at destinations is but a necessary result of competition. The Commission's findings concede that buyers of cement will not pay more for one brand of cement than for another. [Finding 9(a), R. 16023.] California Portland and Riverside, the larger and older mills, have equal freight rates and logically sell at the same prices. Southwestern and Monolith have the same freight rates to most destinations and logically sell at the same prices. They have freight rates higher than the Colton-Riverside rates by uniform amounts per cwt. for the principal market points in California and equal to the Colton-Riverside rates for the principal market points in Arizona. There is no finding or evidence that prices anywhere in the area have been at artificial or unnatural levels. No inference of conspiracy even among the four companies in the isolated market area can be drawn from the circumstances of equal destination prices.

(iii) The evidence shows that price changes from December 12, 1933 to February 2, 1939, involved ten changes in mill net on Los Angeles business and eight changes in mill net on Phoenix business within a range of 40 cents per barrel. [R. 13057.]

(iv) The desert mills, Victorville and Monolith, are located in very sparsely settled desert areas with no substantial market for cement with the result that there is no substantial cross hauling in the Southern California market area. While the desert or outer mills haul past and beyond the inner mills there is no substantial hauling from the inner mills into the area around the outer mills. The interstate market lies far to the east of all mills. [R. 13058, 13062.]

(v) There is no evidence that prices anywhere in the market area have been at artificial or unnatural levels. The evidence does not show any practice or any occasion for a practice on the part of any mill in the area to maintain a high mill net on nearby business to offset reduced mill net on business at remote destinations. The locations of the mills with reference to market area suggest no occasion for such a practice.

2. The Findings or the Evidence Respecting the Acts or Practices of California Portland in Pricing Cement for Sales to Government Agencies Are Not Sufficient to Give Rise to an Inference or to Sustain a Finding or Conclusion That California Portland Used the Pricing "System" or Was a Party to a Conspiracy to Use It.

The subject of Government bidding while made much of in the trial is covered only briefly in the Commission's brief for two purposes, first, to illustrate the Commission's point that cement prices at any destination are equal and, second, to cover the allegations of subdivision (d) of paragraph 7 of the Complaint, that respondents follow similar trade practices in bidding for destinations enjoying land-grant freight rates.

(a) Practices of California Portland With Respect to Pricing and F. O. B. Mill Bidding on Government Sales.

The affirmative evidence very definitely shows that California Portland quite consistently followed the practice of bidding on Government invitations in the manner requested by the Government, giving f.o.b. mill bids whenever bids on that basis were requested. The great bulk of the bids submitted to the United States for many years before the Code period and at all times since the Code period were on a f.o.b. mill basis. These facts are very definitely proved by the table of Government bids submitted by California Portland shown at pages 13050 and 13051 of the Record. Up to the "last few years" the f.o.b. mill bid price was usually a derived price derived from the regular destination list price and a deduction of commercial freight sometimes with and sometimes without an additional deduction in even cents. [R. 13049.] In the "last few years" about 70% of the bids were on a f.o.b. mill basis without reference to destination price. [R. 13119.] California Portland also bid in response to invitations which did not disclose the destinations. [R. 13052.]

On page 44 of its brief the Commission refers to testimony of Admiral Peoples. The Admiral testified as shown at page 3710 of the Record that at points west of Denver the Procurement Division had been able to obtain f.o.b. mill prices, *i. e.*, it had been able to obtain "favorable prices"—"different prices."

California Portland and each of the Southern California mills submitted bids on a Government invitation of March 30, 1938, which asked for bids for undetermined

quantities for undetermined destinations within zones. California Portland bid a f.o.b. mill price which was 4 cents per barrel less than the company's mill net from commercial sales to dealers at Los Angeles. [R. 13052, 3662, 3669.]

Despite the fact that the undisputed evidence showed that California Portland consistently gave the Government f.o.b. mill bids when it asked for them, the Commission on page 99 of its brief harps back to an obvious misinterpretation of a letter from California Portland to Professor Burns, dated September 13, 1935. [Commission's Exhibits 971-22-Z.] We quote the portions of the letter which the Commission refers to:

> "Where cement is sold f.o.b. our mill to United States Government and railroads, the practice results in a different destination price for shipments from each of the cement mills in the territory, whereas *if* the policy of no sales f.o.b. mill could be maintained, the destination price would be the same for all mills."

The letter plainly states that a policy of no sales f.o.b. mill to the Government and the railroads *cannot* be maintained.

In the next sentence the Commission complains that California Portland's f.o.b. mill prices were derived by a deduction of commercial freight from the list prices at the destinations. The complaint amounts to no more than this: The commercial destination prices were fixed in accordance with the method followed for commercial business; the Government prices are based on the said destination prices; therefore the Government prices are subject to the same objections that are directed to the commercial prices. This adds nothing to the argument

made with respect to commercial prices. It has been shown that California Portland's commercial destination prices were not fixed in accordance with the pricing "system" described in the Complaint and the findings.

Furthermore the Complaint [R. 133] charges that respondents collectively refused to make f.o.b. mill bids. This charge is not sustained as to California Portland. There is no charge and no evidence that respondents generally combined to or did file f.o.b. mill bids derived from destination prices.

(b) Practices With Respect to Land-Grant Rates.

The Commission, commencing at page 56 of its brief, refers to the practices in bidding on Government invitations for destinations enjoying land-grant rates. It contends that the prices resulting from the methods of bidding were at unnatural or artificial levels and called for an application of the principles applied in the *Maltsters* and *Milk Can* cases. The general argument is sufficiently answered in other briefs and we limit ourselves to pointing out that the evidence shows without dispute that California Portland did not use the "system" referred to or any method which produced the result complained of.

The findings on the subject are in paragraphs 8(h) to 8(o). [R. 16013.] Paragraph 8(m) finds that the Institute disseminated land-grant rate information for a time in 1935 and 1936. Paragraph 8(o) finds that for a time there was informal exchange of land-grant rates among certain respondents on the Pacific Coast and that Pacific Coast Cement Institute collected and disseminated land-grant rates. [R. 16018-22.] The evidence on the subject is catalogued in Appendix A of the brief in Case

23 commencing at page 752. A map of land-grant railroads is found at page 758. The evidence regarding sources of rate information is outlined commencing at page 764. None of the Commission's evidence so far as we can find mentioned or related to California Portland except that regarding certain acts of Pacific Coast Cement Institute. There is no evidence that California Portland ever requested rate information from Pacific Coast Institute. The affirmative evidence was to the effect that it had never requested or used land-grant rate information from Pacific Coast Institute.

Mr. Blair, an employee of the company, testified [R. 13045-46] that the company did not send land-grant freight rate information to the Institute and that the company did not ever use or make any bid on the basis of land-grant freight rate information received from the Institute. He testified that Southern Pacific Railroad and Atchison, Topeka & Santa Fe Railroad are the only railroads over which the company has shipped cement which have had land-grant freight rates and that each of said roads for many years has maintained a policy of furnishing on request a statement showing the land-grant freight rates to any requested destination from each of the mills which can compete in selling cement for such destination. He testified that because each of the companies concerned usually asked the railroads for such information and Mr. Keller of the Pacific Coast Cement Institute also asked for such information, the information requested by anyone of the companies or the Institute was sent to all, thus avoiding the duplication of reports. He testified that his company did not ask for land-grant rate information from Pacific Coast Cement

Institute but went directly to the railroads for the information. He testified that for most Government destinations, the land-grant rate information is available from data collected in connection with previous sales to the Government. [R. 13045.]

(c) Exact Six Decimal Land-Grant Rate Information Was of No Importance to California Portland in Determining Bid Prices Because Its Policy Was to Bid in Two or Three Decimals and Not to Attempt Tie Bidding.

A very large proportion of California Portland's sales to the Government have been shipped with land-grant freight rates. The mileage over land-grant railroads from California Portland's mill to Government destinations is different from the mileage over such roads from the mills of competitors. As a consequence the land-grant freight rates are different from each mill. [R. 13049.]

Land grant freight rates used by the government are stated in six decimals. In order to make bids tie, the price bid would be determined as follows: Take the commercial price at the government destination, deduct the commercial freight rate from each mill likely to compete, add the land grant freight rate from each mill to the destination. Each price would be in six decimals and the lowest sum would be the price bid.

California Portland has not followed this method of bidding. California Portland has not attempted to determine exact land-grant rates. It has followed the practice of estimating approximate land-grant rates and of bidding in two decimals, even cents, sometimes three decimals. Tie bidding is absolutely impossible on bids on

jobs shipped by land-grant railroad under this system of bidding. In the testimony of Mr. Blair there are listed some 543 bids to the government, and all of the bids were in court during his cross-examination and had been submitted to Commission's counsel. [R. 13049-51, 13106-10, 13120-23.]

The so-called "control clause," which came into use during the N. R. A. Code period was used by California Portland during the latter part of the Code period. California Portland did not use such a clause before the Code period and did not use it after the cessation of Code enforcement in June, 1935. [R. 13105.]

Thus California Portland did not attempt, or accomplish uniformity in destination costs for Government bids where land-grant rates were involved. It made its bid prices on a basis which made uniformity in destination costs impossible.

(d) Bartlett Dam Special Freight Rate.

One of the natural effects of land-grant rates is that the longer shipments receive greater land-grant rate credits than shorter shipments. Thus Colton and Monolith had equal commercial rates to Earp (Parker Dam). [Comm. Ex. 564-2R.] Monolith's shipments passed through Colton after traveling 170 miles before arriving that far on the journey. [R. 13046.] The land-grant rates were, Colton .773870, Monolith .595156. [Comm. Ex. 564-2R.] Obviously the railroad would prefer shipping from Colton rather than from Monolith at even equal rates, the distance being 170 miles shorter. Thus the special rate

for the large job. Colton, Crestmore and Victorville had the same interest to equalize this peculiar advantage of Monolith. [R. 13046.]

If each mill in Southern California bid f.o.b. mill prices at a normal mill net on government business, Monolith would have a constant monopoly on the great bulk of government business in the market area although Monolith is the worst located from a distance standpoint. The table in Commission's Exhibit 564-2R shows that on the basis of land-grant rates, Colton would have to cut .188974 per barrels below its mill net from commercial business at the destination in order to get a look at the Government business. This illustrates why a mill must know its competitor's freight rates if it wants to compete on land-grant rate business. California Portland's method of deducting 19¢ or more instead of .188974 illustrates the point that California Portland did not attempt to accomplish equal destination costs.

The Commission (page 100) refers to the Bartlett Dam bids and to collaboration between Riverside and California Portland regarding freight rates for the job. The Commission insinuates that the mills had no proper concern over freight rates. The situation was similar to the Parker Dam situation. Bartlett Dam is in the vicinity of Phoenix, Arizona. Monolith had equal commercial freight rates with all other competing mills in the blanket area of central Arizona. Because of the 170 miles greater land-grant shipment, its land-grant rate was substantially lower than the rates of its competitors. The railroads were interested in shipping shorter distance for the same rate and on application by Riverside and California Portland, gave a special rate for the job appli-

cable to all mills enjoying the blanket commercial freight rate. [R. 13046.]

On the same principal, because Monolith had a substantial land-grant rate advantage on most government jobs, Colton, Crestmore and Victorville necessarily had to bid prices netting substantially below normal mill net on commercial destination prices in order to compete with Monolith. Obviously they were interested in knowing what the land-grant freight differential was. No inference of agreement to fix prices can be drawn from the *collection* of freight rate information from all available sources.

The inference of agreement to quote uniform prices, if any can be drawn at all, must be drawn from proof of collusive *utilization* of the freight rate information to accomplish uniformity in price. The Commission does not point to evidence that California Portland has followed any practice of utilizing land-grant rate information for any such purpose or with any such result. The affirmative evidence is all the other way.

There is no finding or evidence on the subject of government bidding or on the subject of land-grant rates which adds anything to the evidence on commercial pricing from which an inference of "concert of action" or combination or conspiracy with any respondent outside its market area or with any respondent in its own market area, can be drawn.

3. **The Evidence Is Not Sufficient to Sustain a Finding (a) That, During California Portland's Membership, the Institute Was Organized or Existed for the Purpose of Supporting the Multiple Basing Point System and the Elimination of Price Competition Among Its Members, (b) That During the Period of Such Membership the Institute Did Acts to Support the Said "System" and the Elimination of Price Competition Among Respondents, and (c) That California Portland Had Knowledge or Was Charged With Knowledge That the Institute Was Organized or Existed for Such Purposes and Did Any Such Acts in Support or Furtherance of Such Purpose.**

(a) **A Finding That During California Portland's Membership the Institute Was Organized or Existed for the Purpose of Supporting the Multiple Basing Point System and the Elimination of Price Competition Among Its Members.**

We are looking for a purpose declared or adopted or evidenced in such manner that California Portland had knowledge or was charged with knowledge of it.

The Commission points to the finding that the Articles of Association declared that one of the purposes of the Institute was:

> "To establish and maintain all such lawful trade customs and usages for the protection of the members as the Institute may deem advisable." [Fdg. 70.] [R. 16000.]

There is *no* finding that the Institute ever took any official action to state or declare a purpose or objective "to maintain the multiple basing point system," either the "system" described in the Complaint or a system as it is ordinarily defined.

The Commission *concluded* from facts found immediately following the conclusion that:

> "The multiple basing point delivered price system was one of the customs and usages to be maintained."

The facts upon which the *conclusion* is based were that in 1929 the Institute adopted a code of ethics [Comm. Exs. 136 G-J, 138 H-M] which made recommendations regarding trade practices which if carried out might tend to support a multiple basing point system. The code of ethics was cancelled in June 1933 and was not in effect at any time while California Portland was a member of the Institute. [Comm. Ex. 605 A-C.]

Other activities of the Institute referred to in the findings are discussed under the next heading where the point is made that there is no evidence to support an inference or finding that the activities were carried on for the purpose of maintaining the price "system" and eliminating price competition among respondents. The discussion sufficiently shows that such evidence does not support a conclusion that it was a purpose of the Institute to support a multiple basing point system and the elimination of price competition.

(b) A Finding That During the Period of Such Membership the Institute Carried on Activities to Support the Multiple Basing Point System and the Elimination of Price Competition Among Respondents.

This point is covered in an exhaustive manner in the brief filed in Cases 23 and 24 commencing at page 26. We shall attempt to avoid duplication.

The findings refer to the following activities of the Institute:

Paragraph 7(q) finds that the Institute during the seven months after the *Schechter* decision offered facilities to continue some of the functions of the Code Authority. There is no evidence whatever that California Portland followed the Code requirements after June 2, 1935. There is an abundance of evidence that it ceased compliance with Code requirements at once after the *Schechter* decision; that it did not report or file prices with the Institute or its trade practice committee after June 2, 1935; [R. 13058] that it restored its discount of 20 cents per barrel and all of its old local trade practices at once after June 2, 1935; [R. 13055] that it used no definition of a dealer [R. 13053, 13130] and that it discontinued the use of the control clause at once. [R. 13179.]

Paragraph 8(c)-(g) finds that the Institute maintained or sponsored freight rate bureaus which published and circulated freight rate books among respondents east of the Rocky Mountains covering destinations east of the Rocky Mountains. The books were published by the bureaus and were paid for by the companies who subscribed for them. The evidence regarding them is catalogued in Appendix A to the brief in Cases 23 and 23, Vol. II, page

1937. California Portland did not ever receive any of the books. [R. 13044.]

Paragraphs 8(m), (n) of the findings find that commencing December 12, 1935, the Institute through the Chicago rate bureau experimented with the collection of land-grant rate information. The experiment was ended January 28, 1937. [Comm. Ex. 885-2R.] The evidence is catalogued in Exhibit A of the brief in Cases 23 and 24, Vol. II, page 1132. The service did not extend to California Portland's market area. California Portland did not send any information and received only one rate communication for a destination point far to the east of its market area. [R. 13045.] [Comm. Ex. 841R.]

The Commission in the note at page 94 of its brief refers to additional activities of the Institute which it claims were engaged in to support the alleged pricing "system" and the elimination of price competition. The evidence regarding the Institute's services is catalogued in Exhibit A of the brief in Cases 23 and 24, Vol. III, page 1875. The chart at page 1876 shows the areas to which the services were extended. None of the services referred to was extended to the Pacific Coast or to any part of the market area of California Portland. The testimony of a witness for the company was to the following effect regarding the activities referred to by the Commission:

The activities concerning credits, specific job contract reporting, statistics of stocks on hand of clinker and Port-

land cement, statistics of cloth sack returns, and statistics concerning shipments except that furnished for the purpose of fixing dues, were not carried on in California Portland's market area and no reports or information in connection with such activities were rendered by California Portland to the Institute. [R. 13031-32.]

Any acts of the Institute to standardize the definition of a dealer or to standardize the classification of customers who might buy cement direct from the manufacturer were unobserved and disregarded in the market area. The trade practices in such regards were unique in said area and differed substantialy from the practices listed in the compendium. [R. 13052-53; Comm. Ex. 1310, App. A in Cases 23 and 24, Vol. IV, pp. 2257, 2285.]

Any acts of the Institute to sponsor uniform terms and conditions of sales were unobserved and disregarded in the market area. The trade practices with respect to terms and conditions of sale were distinctive in the area and different from the practices "sponsored" by the Institute or listed in the compendium. [R. 13054-55, Comm. Ex. 1310, Resp. Exs. 3444, 3445, Comm. Ex. 561.]

The activities of the Institute in collecting and disseminating statistics which the Commission charges were designed to limit and allocate production were not extended to the market area. [R. 13058, Comm. Ex. 3308 A-C, App. A of Brief in Cases 23 and 24, Vol. III, p. 1927.]

The following comment by the court below makes a point which we desire to make:

> "The Commission does not find that any pricing practice of the industry generally or that any pricing practice or policy of any respondent was developed or changed by or through membership in the Institute or by or through any act of the Institute. Most important of all perhaps is that there is no finding that the Institute either had or exercised any power or authority or could or did impose any restriction upon the activities of its members." [R. 16772-73.]

> "* * * there is no finding in the instant case that the Institute had any power or authority to enforce its recommendations or to penalize or discipline any members for failure of observance, and no finding that the Institute had anything to do with the fixing or maintenance of prices." [R. 16812.]

There is no evidence of facts from which it can be inferred that the activities of the Institute were carried on for the purpose of maintaining the multiple basing point system described in the Complaint and eliminating price competition among the respondents. Particularly there is no possibility of an inference that the activities were carried on for the purpose of maintaining the said "system" in California Portland's market area and eliminating price competition among the companies in that area. The "system" was not in use in the area, the activities were not extended to the area and no use was made, and no attention was paid, to the activities in the area.

(c) A Finding That Pacific Coast Cement Institute or Its Activities Were in Any Way Connected With The Cement Institute or Its Activities.

The finding involved is paragraph 8(o). [R. 16021.]

The evidence on the subject is fully catalogued in Appendix A to the Brief in Cases 23 and 24 commencing at page 2857, Vol. IV.

In August 1936 the Institute Trustee for Bureau of Mines District No. 11 wrote to the General Manager of The Cement Institute stating that the four Southern California companies desired to establish a divisional office of the Institute at Los Angeles. His letter described the purposes of the division to be the collecting through voluntary action all information with respect to trade and commerce in the district and the dissemination of such information on the following subjects: (1) credits; (2) closed specific job contracts; (3) production and stocks on hand and cloth sack returns. [Comm. Ex. 638-B.] At about the same time James Keller whom the southern California companies had employed to manage the proposed office wrote a similar letter to the Institute.

On September 22, 1936, the General Manager of the Institute wrote Mr. Keller a letter in which he stated as follows [Comm. Ex. 638-2A]:

> "The Board has ordered that all division offices be closed and has failed to accept your office as a branch or division of the Cement Institute. If we provided legal opinions at your request or furnished you direct mailings sent to officers or members of the Institute we would in effect be recognizing a relationship with your office which the Board specifically failed to approve and we cannot put ourselves in that position."

That ended the proposal to form a division of the Institute for the four Southern California companies. Their application for such a division had been based on their feeling that the companies paid dues and received none of the Institute's services in return. The General Manager of the Institute reported to them that local contract reporting and other local services were paid for by special dues over and above general dues and this information chilled the desire for a division. [Comm. Ex. 626 A-G.]

In the latter part of September 1936, following this correspondence, the Pacific Coast Cement Institute was incorporated as a wholly independent trade association. [R. 3471.] It was organized for membership by all Pacific Coast companies. Only the four Southern California companies had been included in the abandoned plans for a division of the national Institute.

Pacific Coast Cement Institute collected information and made reports on bad credits and on closed specific job contracts for the four Southern California companies only. [R. 3473, 3498.] It circulated land grant rate information when requested to do so by one of the Southern California companies. [R. 3484.] Mr. Blair of California Portland testified that his company got its freight rate information from the railroads. [R. 13045.]

The general functions of Pacific Coast Cement Institute, *i. e.*, the functions performed for the membership in general as distinguished from the special services furnished for the Southern California companies, consisted of digesting general statistical data, proposed legislation and general Government and statistical releases regarding

economic conditions, and furnishing such digests to members. [R. 3472, 3209, 3185, 3283.]

The organization was purely local to the Pacific Coast and its specific job contract reporting and credit reporting services were purely local to the four Southern California companies. It performed services in the approved trade association field. It had no connection with The Cement Institute. There was no evidence of any activity in its local field or otherwise which would justify an inference of conspiracy or acts in support of a conspiracy. Particularly its existence or activities furnished no evidence whatever to support an inference that there was a conspiracy with companies outside the local area or that its activities were carried on for the purpose of furthering or supporting any such conspiracy.

(d) A Finding That California Portland Had Knowledge or Was Charged With Knowledge That the Institute Was Organized or Existed, or Carried on Activities, for the Purpose of Maintaining the Multiple Basing Point System and Eliminating Price Competition Among Respondents.

There is no finding that California Portland either had such knowledge or is charged with such knowledge. There is no finding of facts from which such knowledge or charge of knowledge must be inferred.

There is no evidence which would sustain a finding that California Portland had actual knowledge of such purpose or of activities carried on for such purpose.

The only evidence bearing directly on the point is the testimony of E. E. Duque, the President of the company, as follows [R. 13031]:

". . . The Company became a member of The Cement Institute in 1933 while the Cement Code was being formulated under the provisions of the National Industrial Recovery Act. We deemed it necessary to join the Institute in order to participate in the formulation of the Code and in the passing on any proposals for the amendment thereof. In so doing we sought and acted upon the advice of our attorneys that our action was in conformity with law.

After the Code became inoperative in May, 1935, we were solicited by the officers of the Institute to continue our membership. They represented to us and we were convinced that the Institute would constitute a contact between the manufacturers of cement and the legislative and administrative bodies of the United States Government in matters affecting cement companies in general, such as special taxes, tariffs, reciprocal trade agreements, improvement of Government statistical services, et cetera. We believed that there was need for such a contact and continued our membership for this reason.

6. In joining the Institute or in continuing our membership, we did not know or believe that the Institute was created or existed for any purposes not fully disclosed in its articles of association as they existed in 1933 or as they were amended December 11, 1935.

I have never known or believed that it has been a function of The Cement Institute to interpret the policies of the cement companies or to formulate policies for the industry, either through its principal of-

fice or its officers or trustees, or through any regional offices, freight bureaus, or committees. I have not known or believed that the Institute has existed or acted for the promotion of a combination among cement companies to hinder, lessen, restrict, or restrain competition in price among cement manufacturers, or to establish or maintain a 'multiple basing point pricing system' or any system or method of pricing."

There is nothing in the Articles of Association or in the compendium which charges California Portland with knowledge of such purposes. There is no evidence that California Portland had knowledge of any acts of any companies in any other market area to collectively follow the practices referred to in the preamble of the compendium as "considered sound and generally employed."

There is no evidence that California Portland had knowledge of the form or conditions of the freight rate books or of any use which might have been made of them by any companies which used them or of any collective or collusive use which may have been made of them. In fact there is no evidence that California Portland had knowledge of any pricing or other practices in use outside its market area and northern California.

There is no evidence that California Portland had knowledge of what use was made of the Institute's land-grant rate information by companies east of the Pacific Coast area. Particularly there is no evidence that it had any knowledge that any companies used the rate information collusively or collectively to make collusive bids to the Government or that the Institute had any such use in mind in disseminating rate information.

There is no evidence that California Portland had knowledge of any improper purpose in the Institute's contract reporting services by the Institute divisions in the east or in the statistical services or that it had knowledge of any improper or collective action by companies in other market areas which was supported or furthered by the reports or the statistics.

The evidence of California Portland's actions with reference to such activities and services of the Institute indicates that it regarded them to be what they purported to be, proper activities of a trade association with respect to which each member was expected to act independently.

4. The Evidence Is Not Sufficient to Sustain Findings That California Portland, Collectively With the Other Respondents, Followed Trade Practices and Actions Set Forth in Paragraph 7 of the Complaint or in the Findings.

The Commission does not contend that there is any finding or evidence which ties California Portland into any of the evidence or findings on these allegations of the Complaint. In our consideration, in the preceding pages, of the Commission's contentions with respect to the Institute's activities listed on its page 94, we have referred to the affirmative evidence regarding the situation with respect to such acts and practices in California Portland's market area. Since the Commission expressly declares a detailed review of the evidence applicable to California Portland to be unnecessary, we shall accept such declaration.

5. The Evidence Is Not Sufficient to Sustain a Finding That California Portland Participated in the Alleged Conspiracy to Restrain Competition by the Collective Use of the Multiple Basing Point System.

(a) There Is No Direct Evidence of Conspiracy or Agreement.

The Commission concedes that there is no direct evidence of conspiracy or agreement and expressly relies on inferences from evidence of other facts. We want to point out however that there is affirmative direct evidence against the charge. Mr. Duque, the General Manager, and Mr. Blair, the Chief Clerk of the Sales Department, of the company testified that they had never known or believed that there was any competition between California Portland and any out of state mill except with the El Paso mill of Southwestern as to a very small proportion of its production sold in central and eastern Arizona. [R. 13032, 13037.]

Mr. Duque, the General Manager, testified that he had never known or believed that the pricing method used in his company's market area was the same as or similar to the methods used in the east or the system described in the Complaint as the multiple basing point system. [R. 13032.]

Mr. Duque testified that at no time did the Institute have anything to do with the formulation or carrying out of any business or sales policies or practices of his company. He testified that he did not know or believe that the Institute existed or acted to support the multiple basing point system or any pricing system or to eliminate or restrict competition in price. [R. 13031-32.]

(b) There Is No Evidence From Which It Can Be Inferred That California Portland Participated in the Alleged Conspiracy.

We have assumed for the purpose of our argument on this point that the existence of the conspiracy as charged in the Complaint may be found against some of the other respondents. We contend that the cases of companies in California Portland's market area, and the case of California Portland alone, are each unique and must be decided in the light of unique states of fact.

The findings in paragraph 7(m) concede that there is no evidence that there was agreement or conspiracy in the extension of the multiple basing point system to California. [R. 16000.]

We have shown that an inference of participation in the conspiracy cannot be drawn from the evidence of California Portland's use of a pricing system under the principle of the *Maltsters* and *Milk Can* cases even if it were possible to call the company's pricing method in Arizona a multiple basing point system.

We have shown that membership in the Institute plus California Portland's use of its pricing methods, whatever they may be called, do not meet the requirements for an inference of participation in nationwide conspiracy.

We have shown that there is no evidence and no finding of any other states of fact from which an inference can be drawn that California Portland participated in the conspiracy.

ARGUMENT ON COUNT TWO.

We rely on the general points made in the brief filed in Cases 23 and 24 in so far as such general points are applicable to the case of California Portland. We also rely on points made in the brief filed on behalf of Riverside in so far as the points may be applicable to California Portland. We desire to avoid duplication of points sufficiently made in other briefs. We devote ourselves to points applicable to California Portland alone and practices in its market area.

I. THERE ARE NO FINDINGS ON COUNT II ISSUES AGAINST CALIFORNIA PORTLAND.

1. The Issue of Discrimination in Price.

The Clayton Act as amended by Robinson Patman Act provides that it is unlawful in the course of interstate commerce to discriminate in price where either or any of the purchases involved are in interstate commerce. Is it found that California Portland has discriminated in price in its sales in Arizona and Nevada?

In paragraph 23 of the Findings [R. 16124] the Finding is that the "multiple basing point" system is a discriminatory method of pricing. Reference is made to the table in paragraph 7(g) of the Findings [R. 15991] to identify the system referred to. In paragraph 24 [R. 16127] the pricing method referred to is definitely identi-

fied as the "multiple basing point" system described in detail in paragraph 5 of the Complaint. [R. 54.]

There is no Finding that pricing by any other methods, particularly the method used by California Portland in Arizona and Nevada, constitutes discriminating in price. We think we have demonstrated in the earlier parts of this brief that the pricing method used by California Portland in Arizona and Nevada is not the same as or similar to the "multiple basing point" system described in detail in the Complaint and in the Findings.

The Finding of price discrimination does not apply to California Portland.

2. The Issue of Justification in Meeting in Good Faith Equally Low Prices of Competitors.

The finding in paragraph 24(d) of the Findings [R. 16129] is that the defense that the price differential is made in good faith to meet an equally low price of a competitor is not available to respondents who used the "multiple basing point" system pursuant to the combination for the purpose of producing identical prices. The Finding depends wholly upon the existence of findings that California Portland was a party to the conspiracy and used the "multiple basing point" system pursuant to the conspiracy. We think we have demonstrated that there is no finding of either fact.

II. THE FINDINGS IF ANY AGAINST CALIFORNIA PORTLAND ON COUNT II ISSUES ARE NOT SUSTAINED BY THE EVIDENCE.

1. The Finding of Price Discrimination.

The Findings are that the use of the "multiple basing point" system constitutes discrimination in price. Since we have made the point above that California Portland does not use the said system, we shall assume here that the Finding is found to apply against the pricing method used by California Portland.

By statutory definition differentials in price which make only due allowance for differences in cost of delivery do not constitute discrimination in price. Also, by statutory definition a differential in price is not unlawful unless its effect may be substantially to lessen competition. This second subject we will consider under sub-heading 3 below.

In the central and western areas of Arizona, there are blanket freight rates and blanket destination prices which have been explained in earlier parts of this brief. [R. 13040, 13157; Comm. Exs. 1305-8, 1310-12-K.] The mill nets from these destinations are equal and the destination prices differ, if at all, by amounts equal to the differences in freight rates. We therefore spend no further time in setting out the evidence.

In like manner the Commission has made no point about the prices in southwestern Nevada. California Portland's price lists are in evidence. [Comm. Exs. 1305, 1308, 1310, 1311.] We believe the freight rates to the destinations, or California Portland's representations regarding

them, are in evidence as a sheet of Commission's Exhibit 1310 the price list of October 12, 1936. We are not sure that there is any other evidence which shows the Nevada freight rates except the rates for the few destinations shown on Commission's Exhibit 1317-C. We will not pursue the matter because in any event the evidence affirmatively shows that California Portland has had no dealer account and has sold no cement in the State of Nevada except at Las Vegas, Nevada, since 1929, to the Boulder Canyon project and one isolated sale of 250 barrels for Reno in 1935. [R. 13043, 13061.]

Therefore, the only destinations in issue under this finding are the destinations in Arizona easterly of the blanket areas in the western and central parts of the State. For each of these eastern destinations the El Paso mill has a freight rate advantage. California Portland assumed El Paso's prices for these destinations would be equal to the El Paso mill net from its central Arizona prices, plus the freight rates from El Paso to the respective destinations. This was in accordance with the Commission's interpretation of the Clayton Act. California Portland fixed prices on this principle for the destinations although they produced mill nets less than its mill net from the prices in the blanket freight rate areas to the West. [R. 13041, 13061.]

On the theory that the sales at such destinations at prices which produce mill nets lower than the mill nets realized from sales in the neighboring blanket area may be held to constitute "discriminations in price" we will consider the evidence regarding the effect to lessen or restrict competition and the evidence on the matter of justification in that the prices were made in good faith to meet equally low prices of a competitor.

In passing, we call attention to the point made earlier that the volume of California Portland's business in the area east of the blanket area is infinitesimal. In fact, the total business in the eastern area is quite small. [R. 13041-42.] Petitioner has had dealer accounts in the eastern area only in three towns. [R. 13042, 13061.]

2. The Findings on the Issue of Justification in Meeting in Good Faith Equally Low Prices of a Competitor.

As shown under the heading immediately preceding, the only destinations for which California Portland in the course of its interstate commerce has quoted prices which "differ" in mill net return from prices at neighboring destinations are the destinations in eastern Arizona for which the El Paso mill has a freight rate advantage. Mr. Blair testified that the prices quoted for such destinations were equal to the prices California Portland thought a competitor was quoting for such destinations. [R. 13040, 13041, 13079, 13157.]

Price lists for an extended period are in evidence, but freight rates are in evidence only for two periods. Commission's Exhibits 1317-A and 1317-C are labeled as in force May 1, 1938, when the price list of December 10, 1937 [Comm. Ex. 1312] was in force. Mr. Blair on cross-examination testified regarding freight rates which were in force from January 1, 1937, to November 15, 1937, which is the time when the price list cancelled December 10, 1937 [Comm. Ex. 1310] was in force. [R. 13040, 13083, 13157.]

The El Paso price lists in force at these times are in evidence as Commission's Exhibits 1288, 1290 and 1281. The variations in freight rates for the periods up to March 28, 1938, are shown in the table in Mr. Blair's testimony at Record page 13040. The increases and reductions in freight rates shown by the table applied generally in the blanket area and in the area in western Arizona blanketed for the California companies. [R. 13061.] It is our position that the price lists we have referred to and the freight rate evidence we have referred to, by mathematical processes, demonstrate the conclusions we have expressed, that California Portland's prices in eastern Arizona "meet" a competitor's equally low prices. Since we anticipate no dispute on the subject, it is useless to demonstrate the mathematical process in this brief.

The Findings in subdivision (d) of paragraph 24 [R. 16129] conclude that the use of the "multiple basing point" system for the purpose and with the effect of producing identical delivered prices at a destination and thereby avoiding price competition precludes the defense of justification that the lower prices were made in good faith to meet equally low prices of a competitor. The Commission means to find that the low price is not made in good faith if it is made pursuant to and in furtherance of a conspiracy to restrict competition in price. Thus, under this finding, the Commission must establish that California Portland was a party to the alleged conspiracy in order to make the finding applicable to it. We refer

back to our argument on Count I on this point. In paragraph 25 [R. 16131] it is found that the discriminations are not made in good faith to meet an equally low price of a competitor. We contend that these findings are not sustained by the evidence.

California Portland's witness testified that its sale of cement at the destinations referred to were made at the said prices in good faith in order to meet equally low prices of a competitor. [R. 13041, 13061, 13079.] No direct evidence on the subject was produced by the Commission. There is no proof on which an inference contrary to this testimony can be based except the evidence discussed in the argument on Count I. The Commission concedes that El Paso must quote the said prices in order to give only due allowance for any differences in the costs of delivery. If California Portland is to compete, it necessarily must meet the prices of a competitor. The justification of such prices is clear.

The issue is extremely minor from the standpoint of volume of business involved. The number of dealers and purchasers and the number of Government sales involved are shown at pages 13041-42 of the Record for the years from 1927 to 1937.

There is no evidence to sustain the Finding. There is no justification for the failure to find in favor of California Portland on the issue.

3. The Finding on the Issue of the Effect of the "Price Differential" to Restrain Competition.

The Finding is in subdivision (b) of paragraph 24 and in paragraph 25. [R. 16128, 16130.]

The Complaint alleges in paragraph 6 of Count II [R. 224] that the discriminations are made with the purpose to prevent, lessen and destroy competition in price in interstate commerce on the part of the California Portland *"with all other producing respondents."* The Complaint alleges in paragraph 9 [R. 249] that the acts of discrimination in interstate commerce performed in the actual course of such commerce may have the effect substantially to lessen, and they do substantially lessen, competition in cement. It alleges in paragraph 8 [R. 241] that the effect is to injure, destroy and prevent competition in price on the part of California Portland with all others who likewise grant discriminations under the pricing system. Paragraph 24 of the Findings [R. 16127] finds that the Complaint alleges that the effect of the discriminations is to prevent, lessen and destroy competition in price among respondents and that each allegation of the Complaint is true. Paragraph 25 of the Findings [R. 16131] finds that the effect has been and may be substantially to lessen and destroy competition and tend to create a monopoly in the sale of cement and has been and may be to injure, destroy and prevent competition with respondents who grant and exact such discriminations.

There is absolutely no evidence to sustain these Findings. The Commission's evidence made no reference to the destination points in eastern Arizona or to competitive conditions in the area or to competitive conditions between that area and other areas. We can think of no proof whatever on which any inference in support of the Finding can be based.

On the other hand, there is abundant evidence that the "price differentials" could have no possible effect to lessen competition among respondents, or among buyers, in any way. Not even the Commission finds or contends that there is any effect on competition with the buyer who receives the benefit of the price differential.

The geography of the eastern California, Arizona and southern Nevada areas is within the judicial knowledge of the court. It is described at pages 13058-62 of the Record. The population, the distances between towns and the non-existence of competition between towns and areas is shown by that evidence. It is shown that there is no local business or competition between towns in California and towns in Arizona or Nevada, that cement buyers in one area are not in competition with buyers in another area. The distances between markets are great and the intervening areas are waste areas.

The El Paso mill is owned by Southwestern which also owns the Victorville mill in Southern California. The competition of California Portland in the entire market area is with the same companies at all points in the area.

The freight advantage of the El Paso mill over California Portland's mill at the eastern Arizona points is shown by Commission's Exhibits 1317-A and 1317-C and by the testimony of Mr. Blair at pages 13083 and 13157 of the record. At all points except Nogales, where the difference is 2¢ per cwt. or .076 per barrel, the differences are substantial, Bisbee 6¢ per cwt., .228 per barrel, Holbrook 5¢ per cwt., .19 per barrel, Globe 9¢ per cwt., .342 per barrel.

The Finding goes a step farther than the Complaint and alleges that the price differential also tends to promote monopoly. The El Paso mill has a natural advantage in the small business in the eastern section of Arizona. [Comm. Exs. 3057, 3060, 3061.] If California Portland did not compete to some extent in the Bisbee, Globe, Holbrook areas at a lowered mill net, the advantage would be widened, not narrowed.

There is no evidence whatever to sustain the Finding. There is no justification for the failure to find in favor of California Portland on the issue.

OTHER POINTS.

I. The Order Is Erroneous in That the Acts Prohibited Do Not Constitute Unfair Methods of Competition or a Contract, Combination or Conspiracy in Restraint of Interstate Commerce.

The point is made in paragraphs I-1, 2, 3, 5(a) and 5(b) of the Statement of Points. [R. 16469.] We specify particularly the following provisions of the Order:

1. The use of the words "planned common course of action" or words different from the statutory language.

2. The inclusion of the language "or between any one or more of said respondents and others not parties hereto."

3. The extension of the prohibition at least as to some of the practices listed in paragraph 2 of the Order to understandings between "two or more" or any number less than the respondents generally.

II. The Order Is Erroneous in That It Prohibits Methods of Competition and Acts and Practices Not Charged in the Complaint.

The point is made in paragraph I-5 of the Statement of Points on page 3. [R. 16469.] Reference is made to the paragraph and subparagraphs (a) to (h) thereof.

Reference is made to the argument and cases cited on the point in the brief in cases 23 and 24.

III. The Order Is Erroneous in That It Is so Vague and Indefinite as Not to Provide a Standard of Conduct by Which Respondent Can Be Guided.

The point is made in paragraph I-6, page 4, of the Statement of Points. [R. 16470.] Reference is made to the brief in cases 23 and 24.

IV. The Findings Are Improper in Form and Indefinite and Argumentative and Lack the Requisites of Findings Upon Which an Order May Be Based.

The point is made and particulars are specified in paragraphs II-1 and 2 on pages 5 to 8 of the Statement of Points. [R. 16471-74.] We refer to the Propositions of Law on the point stated in the brief in cases 23 and 24.

V. The Commission Erred in Admitting Evidence Which Was Not Admissible Against Respondent and in Overruling Respondent's Objections and Denying Respondent's Motion to Strike or to Limit the Application of the Evidence.

The points are made in part III of the Statement of Points at pages 45-46 [R. 16500] where the references to the Record are made by references to the page numbers in the original Transcript.

The point is made with respect to the evidence bearing on the individual paragraphs of the Findings referred to in this brief. Our purpose is to prevent the application to the case against California Portland of the irrelevant and improper items of evidence.

CONCLUSION.

We have endeavored to demonstrate that the position of California Portland and the companies operating in its market area is unique, that the market area is isolated, that evidence respecting companies and trade practices in other market areas has no relevancy to prove any facts with respect to California Portland or its market area and that no inferences can be drawn respecting California Portland and its market area from facts proved with respect to companies operating elsewhere. In emphasizing this position, we do not mean to indicate any lack of confidence in the correctness of the positions taken in the briefs filed on behalf of companies operating elsewhere. The positions taken and arguments made in the brief filed in cases numbers 23 and 24 are well and adequately stated, and we join therein to the extent that they are applicable to California Portland. We contend as is contended in the Riverside brief that the Commission made the correct decision in its report to the Senate in 1933 in leaving the Southern California mills entirely out of its "multiple basing point" accusations.

We respectfully submit that the judgment of the Circuit Court of Appeals vacating the Order of the Commission should be affirmed upon each of the grounds which we have urged.

Respectfully submitted,

ALEX W. DAVIS,
ROBERT B. MURPHEY,
Attorneys for California Portland Cement Company.

MURPHEY AND DAVIS,
Of Counsel.